M.K.S.K. TRADING SDN. BHD.

v.

SYKT. MASHOR KEMAJUAN SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. D2-23-26 OF 1987]
9 FEBRUARY 1989

CIVIL PROCEDURE: *Appeal against Senior Assistant Registrar's decision granting leave to defend - Condition - Payment of sum into Court - Whether such order tantamounts to giving judgment to the plaintiff.*

CONTRACT: *Guarantee - Whether void for uncertainty as limit of guarantee not specified - Whether there was a material variation in the guarantee document as to interest.*

The plaintiff claimed against the defendants for the sum of RM105,342.22 being the balance sum due and owing by the 1st defendant to the plaintiff at the request of the 1st defendant together with accrued interest for the late payment of the principal sum at the rate of 18% per annum. The 2nd defendant guaranteed payment of all moneys due from the 1st defendant to the plaintiff. The Senior Assistant Registrar granted the 2nd defendant conditional leave to defend the action subject to the 2nd defendant depositing in Court RM105,342.22 within one month from the date of the order. The 2nd defendant appealed against this order.

Counsel for the 2nd defendant submitted that it was wrong to order the 2nd defendant to pay into Court RM105,342.22 as the defendant was in no position to satisfy the condition and it was tantamount to giving judgment to the plaintiff. It was also contended that the guarantee document signed by the 2nd defendant did not specify any amount to show the limit of the guarantee and it was void for want of certainty. The second defendant also contended that there was a material variation between the guarantee document in his possession and that produced by the plaintiff.

Held:

[1] No evidence was adduced by the second defendant regarding his ability to pay the amount of security fixed by the Senior Assistant Registrar. In the absence of any evidence that the second defendant does not have the means to pay a sum of RM105,342.22 into Court, the submission on this point does not have any merits at all.

[2] Since the guarantee is a continuing guarantee and since the paragraph where the amount of the guarantee to be satisfied is left blank, the guarantee has to be confirmed as unlimited. Such guarantee will not be regarded as uncertain.

[3] The 2nd defendant had a basis in alleging that the plaintiff had made a variation on the rate of interest in their copy of the guarantee document. There was no evidence to show that the variation was made with the consent of the 2nd defendant. It is not clear when the variation was made. It appears from the 2nd defendant's affidavit that he was not aware of the variation and if variation was made without the 2nd defendant's consent, the 2nd defendant was discharged as a guarantor. This is a material issue which should be decided at the trial.

[Appeal allowed with costs.]

Case referred to:
MV Yorke Motors (a firm) v. Edwards [1982] 1 All ER 1024

Legislation referred to:
Contracts Act 1950, s. 86
Rules of the High Court 1980, O. 14

Other sources referred to:
The Modern Contract of Guarantee by O'Donovan Phillips, [1985] pp. 157 & 158

For the 1st & 2nd defendants - Wan Harun bin Wan Hassan; M/s. Harun, Sukri & Nordin
For the plaintiff - Baziozaman; M/s. Samsuni Lim & Partners

JUDGMENT

Zakaria Yatim J:

This is an appeal by the second defendant against the decision of the Senior Assistant Registrar given on 4 November 1988 granting the second defendant conditional leave to defend the action subject to the second defendant depositing in Court RM105,342.22 cents within a period of one month from the date of the order.

The plaintiff's claim against the defendants is for a sum of RM105,342.22 being the balance sum due and owing by the first defendant to the plaintiff for goods sold and delivered to the plaintiff by the first defendant at the request of the first defendant. The plaintiff also claims against the first defendant a sum of RM16,567.83 cents being the accrued interest for the late payment of the principal sum at the rate of 18% per annum.

The first defendant is the principal debtor in this case. The second defendant is a guarantor who guaranteed payment of all moneys due from the first defendant to the plaintiff in respect of goods sold and delivered by the plaintiff to the defendant. Encik Wan Harun, Counsel for the second defendant submitted that the Senior Assistant Registrar was wrong in ordering the second defendant to pay into Court RM105,342.322 cents. According to him, the second defendant was in no position to satisfy the condition. He added that the amount stated in the condition was tantamount to giving judgment to the plaintiff.

In support of his submission he cited a House of Lords' decision in *MV Yorke Motors (a firm) v. Edwards* [1982] 1 All ER 1024. In that case, the respondent was sued by the appellant and summons for judgment under O. 14 was issued. The respondent obtained a legal aid certificate with a nil contribution. The Master gave unconditional leave to defend but his decision was varied on appeal by Boreham J who made the appellant's leave to defend subject to the condition that he brought into Court the sum of 12,000 pounds within eighteen days. The appellant appealed to the Court of Appeal and the Court of Appeal reduced the sum to 3,000 pounds. In his speech at p. 1027, Lord Diplock referred to the decision of Brandon LJ in the Court of Appeal where the Lord Justice stated that if a sum ordered to be paid as a condition of granting leave to defend was one which the defendant would never be able to pay, then that would be a wrongful exercise of discretion, because it would be tantamount to giving judgment for the plaintiff notwithstanding the Court's opinion that there was an issue to be tried. The Court of Appeal reduced the amount to 3,000 pounds after taking into consideration the ability of the appellant to pay into Court. According to the evidence in that case, the appellant was on a legal aid certificate. He was a second hand car dealer. Evidence was adduced before the Court of Appeal that the appellant did not have a house of his own but was living with his father in his father's house in Swaffham. It was on

the ground that the appellant did not own a house that led the Court of Appeal to reduce the amount of security required from 12,000 pounds to 3,000 pounds. The House of Lords confirmed the decision of the Court of Appeal.

In the present case no evidence was adduced by the second defendant regarding his ability to pay the amount of security fixed by the Senior Assistant Registrar. In his affidavit affirmed on 20 January 1988 he averred that he was the managing director of the first defendant company. In the absence of any evidence that the second defendant does not have the means to pay a sum of RM105,342.22 cents into Court, Encik Wan Harun's submission on this point does not have any merits at all. The question to be considered here is whether the Senior Assistant Registrar was right in granting the second defendant conditional leave to defend. Encik Wan Harun submitted that the guarantee document signed by the second defendant did not specify any amount to show the limit of the guarantee in the guarantee document. This point was not disputed by Encik Baziozaman, Counsel for the plaintiff. In the same affidavit, the second defendant stated that the guarantee document was void for want of certainty and therefore it was of no legal force. He added that the guarantee document was vague because it did not contain the amount that he was liable to pay. He said that the guarantee was an unlimited guarantee.

In my opinion since the guarantee is a continuing guarantee and since the paragraph where the amount of the guarantee to be satisfied is left blank, the guarantee has to be construed as unlimited. Such guarantee will not be regarded as uncertain. *The Modern Contract of Guarantee* by O'Donovan Phillips. [1985] pp. 157 & 158.

Encik Wan Harun drew my attention to para. 3 of the guarantee in which the rate of interest was specified. The guarantee which was duly signed by the second defendant on 5 May 1985 and exhibited to the same affidavit showed that the rate of interest was 12% per annum. In the statement of claim the plaintiff was claiming interest at 18% per annum. The plaintiff's claim for 18% per annum was based on their copy of the guarantee document which was exhibited to their affidavit in support of their O. 14 application. The guarantee document which was duly signed by the second defendant was identical to the guarantee document exhibited by the second defendant except that in para. 3 of the guarantee document exhibited by the plaintiff the 12% interest rate was deleted and replaced with 18% interest rate. The amendment on the interest rate was made in ink, but it was not initialled by either party. The second defendant in the same affidavit averred that there was a material variation between the guarantee document in his possession and that produced by the plaintiff. In my opinion the second defendant had a basis in alleging that the plaintiff had made a variation on the rate of interest in their copy of the guarantee document. There was no evidence to show that the variation was made with the consent of the second defendant. It is not clear when the variation was made. It appears from the second defendant's affidavit that he was not aware of the variation and if the variation was made without the second defendant's consent, the second defendant was discharged as a guarantor. See s. 86 of the Contracts Act 1950. This is indeed a material issue which should be decided at the trial.

In the circumstances, I allow the appeal and grant the second defendant unconditional leave to defend the action. The second defendant will file his defence within twenty-one days from the date of this judgment. The plaintiff will pay the second defendant the costs of this appeal.

Also found at [1989] 1 CLJ 1087